Smith v. The Abandoned Vessel Doc. 35

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NATHAN SMITH	§	
Plaintiff	§	
	§	
V.	§	**CIVIL ACTION H-07-784**
	§	
THE ABANDONED VESSEL,	§	
In rem	§	
Defendant.	§	

PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED ORIGINAL COMPLAINT

Comes Now, Nathan Smith, and files his Motion for Leave to File the attached First Amended Original Complaint and would show the Court as follows:

A. INTRODUCTION

1. This case involves a claim to a lost vessel potentially bearing treasure valued in the millions of dollars. Plaintiff, Mr. Smith, seeks leave of Court to file his First Amended Original Complaint. By this amendment Mr. Smith to clarify the original claims asserted. Mr. Smith also seeks to add the law firm formerly representing him, Killeen and Stern, PC ("K&S") in this matter as a defendant and seeks a judgment declaring that K&S and has no rights to Mr. Smith's recovery.

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B.
FACTUAL BACKGROUND

2. K&S entered into a contract with Mr. Smith to represent and assist him in pursuing his claims relating to the salvage/ownership of an unidentified wrecked and abandoned Spanish ship located in or near Refugio County, Texas ("VESSEL"). A copy of the Contract is attached as Exhibit A and incorporated by reference as it fully set forth herein.

3. In consideration for these services, the contract provides for K&S to receive a portion of the ultimate recovery in the suit.

4. On March 6, 2007, Mr. Smith filed his Original Complaint (DKT #1) seeking a determination that title to the VESSEL, has been vested in Mr. Smith, in addition to other remedies associated with ownership and salvage of the VESSEL.

5. On September 7, 2007, the Court signed an Order on Entry of Judgment and Declaratory Judgment in Mr. Smith's favor. (DKT #6).

6. On September 11, 2007, Intervener, Marie Sorenson, filed a Plea in Intervention, Opposed Motion for New Trial, Plea to the Jurisdiction, Motion to Transfer Venue, and Objection to Mr. Smith's Motion for Declaratory Judgment with Orders. (DKT #12 & #13).

7. K&S failed to file any response to these motions.

8. On September 14, 2007, the Court signed the Order Vacating Entry of Judgment and Declaratory Judgment that was entered on September 7, 2007.

9. Shortly after the Court signed that order, K&S informed Mr. Smith that the Court transferred his case changing the venue from the Southern District of Texas, Houston Division to the Southern District of Texas, Victoria Division. This was not in fact true.

10. K&S breached the standard duty of care it owed to Mr. Smith in at least the following respects:

a. K&S failed to respond to critical motions filed by Intervener as it represented to Mr. Smith it would do;

b. K&S provided erroneous information to Mr. Smith regarding the case;

c. K&S failed to adequately communicate with Mr. Smith; and

d. K&S improperly managed the litigation.

11 Mr. Smith discharged K&S and engaged another law firm to represent him.

12. On September 18, 2007, K&S filed its Motion to Withdraw as

Counsel asserting that Mr. Smith had discharged K&S from the case and Robert J. Killeen, Jr. had terminated representation pursuant to the Contract. (DKT #15).

13. K&S has not responded to numerous attempts by Mr. Smith's counsel to contact it regarding the Contract.

14. Despite the fact that new counsel will be providing the services required to pursue Mr. Smith's rights, the Contract states K&S may retain a 33.3 percent interest in any recovery by Mr. Smith.

15. To allow K&S to retain an interest in Mr. Smith's recovery after K&S's breach of its duties to Mr. Smith and without K&S providing any services of value, would be unconscionable. There is no reasonable or subjective parity between the services actually provided by K&S and the amount of compensation received. As a result, the Contract is unconscionable and unenforceable

16. The Rule 16 Scheduling Order issued by the Court on October 25, 2007, requires that new parties be joined, with leave of Court by January 31, 2008.

17. Plaintiff seeks leave to join K&S and to obtain a Declaratory Judgment that K&S has no further interest in this matter.

C.
ARGUMENT AND AUTHORITY

18. Under the Federal Rule of Procedure, leave must be obtained to amend pleadings; however, leave to amend "shall be freely given when justice so requires." FED. R. CIV. P. 15(a). Unless the opposing party can show prejudice, bad faith, or undue delay a court should grant leave to file an amended pleading. *Forman v. Davis*, 371 U.S. 178, 182 (1962).

19. Mr. Smith now seeks leave to clarify his original claims and supplement the allegations regarding the basis for this Court's jurisdiction over the matter. These amendments will not prejudice or surprise the parties because Mr. Smith set forth the substance of these allegations in his Response to Intervener's Motion to Dismiss.

20. Mr. Smith also seeks to join K&S as a party to this action. As more fully described in Plaintiff's proposed First Amended Original Complaint attached hereto as Exhibit B and incorporated by reference herein, Mr. Smith seeks a judgment declaring the rights and obligations of himself and K&S with respect to the Contract.

21. The Contract, and any dispute arising there from, affects Mr. Smith's ownership and entitlement to any relief he may recover by this action. Thus,

effectiveness of the relief sought through the original claims brought by this suit will be impaired if K&S is not joined as a party. Towards that end, Mr. Smith seeks to amend its Original Complaint to name the K&S as an additional party necessary to the proceedings in this case.

22. This amendment is not filed in bad faith or to delay the proceedings.

23. Mr. Smith's files this Motion for Leave to File his First Amended Original Complaint in compliance with the Docket Control Order entered in this case.

PRAYER

For the reasons stated above, Mr. Smith requests the Court to grant leave to file Plaintiff's First Amended Original Complaint and for all further relief to which Mr. Smith may be entitled.

Respectfully submitted,
/s/ Richard A. Schwartz

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CERTIFICATE OF CONFERENCE

I hereby certify that I have conferred with counsel for Intervenor regarding this motion and agreement could not be reached.

/s/ Richard A. Schwartz

CERTIFICATE OF SERVICE

I certify that the foregoing Plaintiff's Motion for Leave to File First Amended Original Complaint and Certificate of Conference has been served on the following counsel:

Ronald B. Walker
Terry M. Carroll, Jr.
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by U. S. First Class Mail on the 31st day of January, 2007.

/s/ Richard A. Schwartz